

Comments

Law's Republicanism

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Legal scholars are natural scavengers. Perhaps law lies at the intersection of many bodies of human understanding, or perhaps the four walls of legal doctrine make for a particularly narrow space. But we can rarely resist the urge to prowl the terrain of another discipline, and haul its juiciest morsels back to our lair. Republicanism is our latest find. The collectivist strain in American politics that was highlighted by historians in the 1960's, and flourished as an alternative to Rawlsian liberalism in the early 1980's, has now been appropriated by legal scholars. As this recycling of ideas is inevitable and invigorating to legal analysis, the issue is not that it is done, but rather how it is done. Here, I will argue, there may be cause for concern. The legal foray into republicanism has been sidetracked by its intellectual premises. Straitened by the distinctive problems and perspectives of liberal legalism, it has produced a muted hybrid, oddly focused on the role of the courts.

I. THE VIEW FROM THE CAVE

It is one thing to seize upon an appealing idea; it is another to know what to do with it. Legal scholarship has been marked by ambivalence about what republicanism promises the study of law. In the disciplines in which republicanism has previously emerged, scholars have displayed greater clarity about its goals, and about its substantive parameters. His-

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torians such as Appleby¹ and Wood,² who highlighted the republican norms in federalist and anti-federalist thought, sought to illuminate the intellectual currents of the founding. Political theorists such as Sandel³ and Barber,⁴ who proposed political participation on the basis of collective norms, offered a new conception of politics and of humans as political actors. The works of both groups, albeit different, reflected central tenets of republican theory: the importance, to both the individual and the group, of collective discussion and self-direction⁵; the need to appeal to norms broader than individual interest;⁶ the understanding of republicanism as presenting an alternative to the pluralist vision of political life.⁷

Legal republicanism has trod a different, and less certain, path. Legal scholars are not observers of a political founding, or unencumbered philosophers reflecting on political life. We are, to paraphrase Michael Walzer, denizens of a particular cave.⁸ We are influenced by the political regime in which we find ourselves, and by our distinctive professional relation to it. Our assumptions have been shaped by a liberal, pluralist institutional structure, in which collectivism and affirmative citizenship are at best minor themes. We have largely distanced ourselves from the realm of popular politics,⁹ and followed our sense of professional affinity toward the judiciary. These factors have tended to complicate the legal inquiry into republicanism. Our internalization of liberal norms and role constraints has limited our view of republican reform. It has also tempted us to use republicanism—still ill-defined—to address traditional questions of legal theory.

The offerings of Professors Michelman and Sunstein illustrate these difficulties. Michelman's judicial republicanism limits intolerance, and resolves a central problem of constitutional theory; but it undervalues the republican norm of self-conscious popular engagement. Sunstein highlights the popular sphere, but allows his liberal suspicion of shared substantive norms to render his vision incomplete. Such efforts should prompt a reconsideration of legal republicanism. By reassessing the role of sub-

1. See, e.g., Appleby, *The Social Origins of American Revolutionary Ideology*, 64 J. AM. HIST. 935 (1978).

2. See, e.g., G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969).

3. See, e.g., M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

4. See, e.g., B. BARBER, *STRONG DEMOCRACY* (1984).

5. See, e.g., *id.* at 117-261 (1984); H. ARENDT, *What is Freedom?*, in *BETWEEN PAST AND FUTURE* (1961).

6. See, e.g., H. ARENDT, *supra* note 5; Wood, *Interests and Disinterestedness in the Making of the Constitution*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 69, 83-92, 96-100 (R. Beeman, S. Botein & E. Carter eds. 1987).

7. See, e.g., B. BARBER, *supra* note 4; M. SANDEL, *supra* note 3.

8. See Walzer, *Philosophy and Democracy*, 9 POL. THEORY 379 (1981) (discussing roles of philosophers, political philosophers, and poets in city).

9. It is easy to overstate this point. Some legal scholars, including Professor Sunstein, have taken a continuing interest in popular political participation. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* (1980) (role of judiciary should include supervision of political process); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

stantive norms, and placing legislative participants as well as judges in our sights, we can reclaim the popular, collectivist strain of republican thought that has thus far eluded us.

II. RE: THE PEOPLE

For Michelman, republicanism provides a justification for enhancing the scope of judicial review. But before it can be enlisted in the constitutional cause, republicanism must be purged of its exclusionary and coercive tendencies. Indeed *Bowers v. Hardwick*,¹⁰ Michelman's point of departure, suggests that constitutionalism and republicanism suffer from similar failings. The popular primacy central to both permitted the citizens of Georgia to exclude sexual nonconformists, and the Court to defer to their will. Michelman seeks a theory of politics that will simultaneously discredit the exclusionary urges of "popular authoritarianism," and give the Court a dominant position in implementing a more inclusive vision.

To find this theory, Michelman turns from the direst consequences, to what he views as the highest aspirations of the two traditions. He begins with the paradoxical demand of constitutionalism that citizens be self-governing, yet that the regime be one of "laws and not men."¹¹ His answer to this conundrum is to conceive of politics "as a process in which private-regarding 'men' become public-regarding citizens and thus members of a people [B]y virtue of that people-making quality . . . the process would confer upon its law-like issue the character of law binding upon all"¹² This process, which he refers to as "jurisgenesis," also reflects an important strain of republican analysis. According to this tradition, politics means the discussion of alternatives by reference to a shared historical, cultural, political, and, ultimately, normative context. Features of this context are invoked, debated and, over time, revised. These discussions occur not only in legislative settings, but in agencies, civic organizations, workplaces and street life. Acts or judgments that emerge from this process of "re-collection" are regarded as "law," regardless of the formal source from which they emanate.

Michelman's jurisgenic notion provides a neat solution to the conundrum of "self-government" and "government by laws." Moreover, his view of law as the expression and revision of a collective identity has considerable appeal. But when this vision is regarded not simply as a reconceptualization, but as a set of acts in which flesh-and-blood citizens engage,¹³ more substantial doubts arise. The question, as Michelman

10. 478 U.S. 186 (1986).

11. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1500 (1988).

12. *Id.* at 1502.

13. It is conceivable that Michelman's discussion of the popular "conversation" is simply a metaphor or analogue for the "re-collective" activities of judges and that he is less concerned with activities of flesh-and-blood citizens than it might first appear. I find this interpretation unconvincing, however,

belatedly observes, is what "a process-based, republican-but-not-pluralist, constitutional jurisprudence [would] be like."¹⁴ "Jurisgenesis" begins with a popular conversation, in which participants draw on the features of their collective identity, expressed in "narratives, analogies and other professions of commitment,"¹⁵ to answer questions about how they should live. Contemporary plurality prevents this normative context from being agreed upon in all its details by participants; and social and cultural change prevents even uncontested features from being static over time. Thus the conversation, while richly plural, is non-pluralist in two senses. First, participants with differing perspectives appeal to each other, in hopes of changing each other's normative understandings. Second, participants regard any change of mind that results not as coercive, but as part of the normative reconsideration that goes on even in the midst of historical or cultural continuity. The informal setting of many of these conversations is, as noted above, a final defining characteristic.

Yet jurisgenesis is not exclusively, or even primarily, popular. Presiding over these "jurisgenerative popular conversation[s]" are the courts. Michelman describes them as "assisting in the maintenance"¹⁶ of the popular dialogue; but in fact their role is more substantial. His critique of Ackerman's theory¹⁷ as enslaving the Court to popular authoritarianism, and his contrasting praise of the Court's leadership in the *Brown* era, suggest the kind of role he intends. The courts consider the varying and sometimes cacophonous strains of the popular conversation; they extract those themes that seem to them most consistent with their vision of the community as it has evolved over time. In particular, they enforce the inclusionary commitment that may be overlooked by other participants, bringing into the community those "at the margins" whose differing visions enrich its common life. Michelman stops short of a strong claim that courts have greater competence at jurisgenerative "re-collection" than popular participants. Yet his reluctance to designate a limited realm of popular primacy, and his declaration that even a scheme of intermittent judicial deference risks popular authoritarianism, seem to establish the judiciary as the dominant partner.

The greatest enigma of Michelman's theory is the nature of the popular role. Many practical features of this role remain obscure. Michelman does not distinguish, for example, between legislative officials and ordinary participants; nor does he explain the institutional consequences of the shift from legislative primacy. Michelman also fails to clarify a more central,

given his insistence, in discussing the classical roles of "founder" and "citizen," *id.* at 1515-18, that contemporary republicans should understand that the citizen's role is one of "activity."

14. *Id.* at 1526.

15. *Id.* at 1513.

16. *Id.* at 1525.

17. See Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L. J. 1013 (1984). Ackerman's theory is discussed *infra* notes 29-32 and accompanying text.

republican issue: the citizens' understanding of their own political role. One might conclude from Michelman's description of non-pluralist exchange that political self-awareness is a distinguishing feature of the juris-genic conversation. Two factors, however, militate against this conclusion. First, Michelman's vision of jurisgenesis is abstract and complex.¹⁸ It seems unlikely that the average participant would be able to understand her role the way Michelman does. Particularly where the normative framework is that of a nationwide community, citizens lacking Tocquevillian exposure or a prodigious capacity for abstraction might encounter difficulty with the re-collective process. Those fighting their way in from the margins, or pressing for some discrete political change, might have some advantage in this regard: They could develop an alternate, concrete way of explaining their relationship to the political process.¹⁹ But such an explanation might not be available to the mainstream participant, who has neither programmatic nor theoretical resources for describing her civic purpose.

A second factor militating against political self-comprehension is the varied and often informal character of Michelman's popular participation. Many citizens who lack philosophical sophistication currently understand their role by understanding the institutions in which it occurs. Michelman rejects this institutional orientation. He does not look primarily to legislatures to find jurisgenerative conversations, but to agencies, clubs, workplaces—even the street. Michelman views the prevalence of informal engagement as a virtue, tracing its lineage to Ackerman's anti-formalist understanding of constitutional "conventions."²⁰ Yet there are important differences between the political mobilization that preceded the Revolution—or even the New Deal—and the day-to-day exchanges that form the basis of Michelman's popular participation. Participants in the former mobilizations had a set of discrete, political purposes in mind; and they turned to informal channels because formal institutional channels remained closed to their insurgency. Citizens under Michelman's scheme

18. Michelman describes his vision itself as a "re-collection" citizens ought to recognize as consonant with their deepest political assumptions. Michelman, *supra* note 11, at 1513–14. I suspect, however, that he underestimates the difficulty citizens will face in putting the pieces together. If my experience is not atypical, comprehending his process is likely to challenge many a judge and law professor, not to mention the untutored participant. And while I believe we can learn much by attending to intuition, I do not consider intuitive flashes of consonance to be a substitute for careful political self-understanding.

19. Here, as Michelman's narrative suggests, the political mobilization of black Americans provides a good example. A participant in the civil rights struggle might not have explained—in Michelman's terms—that she was enriching the collective normative context by the introduction of a politically marginal vision. But even children taking part in the marches and demonstrations of the late 1950's and early 1960's could explain that they were winning their freedom. *See, e.g.*, R. NELSON & S. WEBB, *SELMA, LORD, SELMA* (1980) (autobiographical narrative of civil rights struggle demonstrating political awareness of six- and eight-year old participants).

20. Michelman, *supra* note 11, at 1519.

need no particular occasion to go "out of doors,"²¹; their informal participation occurs on an ongoing basis. The people are, in one sense, always (though in a more important sense, rarely) making law. They may not even be aware that they are doing it. They may think they are recommending a location for the city park or repeating a story about the incumbent governor, but they are actually initiating the process of jurisgenesis.

Michelman's view of popular participation is troubling for several reasons. First, the pervasive yet apparently undemanding "jurisgenerative conversation" masks a substantial diminution in the popular role. The narratives, professions and conversations that create a collective identity are not, as Michelman points out, anything new. People can and do engage in these exchanges currently, although they generally mean little to the institutions of government. Under Michelman's view they would become crucial fodder for judicial decisionmaking—though they could also be rejected by a judiciary that is empowered to choose among them. Yet if the people's "re-collections" are permitted to contribute to the formation of law, their institutions are no longer accorded the political primacy they enjoy under the present regime.

One may also question a popular role that is such an unself-conscious, quotidian affair. The people's self-awareness seems particularly limited when compared to that of the courts. We may assume that courts, in order to understand the "re-collective" choices that ground their sovereignty, must comprehend the process of jurisgenesis and their role in it.²² If the people's contribution consists of unself-conscious conversations in churches, pubs and workplaces, it is hard to credit Michelman's suggestion that the courts and the people play equal, if contrasting roles of "security" and "activity."²³ On the contrary, Michelman may help to resurrect the classical republican distinction between "founders," who establish the crucial features of the regime, and "citizens," who maintain it on a daily basis. The popular normative "revision" is so continuous, incremental and unself-conscious that it would be difficult to understand it as the kind of rennovative work that belongs to the architects and builders of a regime.²⁴

21. See G. WOOD, *supra* note 2, at 340–50 (using term "people out of doors" to refer to informal or extra-institutional political mobilization).

22. I suppose it is possible that the courts also hold some limited, non-theoretical view of their role, much like the mobilizing "marginal" participants. Yet I would be inclined to take a dim view of a process of lawmaking whose operation is fully understood only by its creator and not by any of the participants.

23. Michelman, *supra* note 11, at 1518. This language comes from the section in which Michelman discusses a potential revision of the classical republican roles of "founder" and "citizen." He characterizes the former role as embodying "security" and the latter, "activity."

24. The unself-conscious, quotidian character of this role casts an odd light on Michelman's closing argument for reconnecting the right of privacy and public life. Michelman's conception of a new grounding for the right of privacy is thought-provoking, if incomplete (e.g., he notes that the ancient citizen's "sense of self-direction" was replenished by the "daily experience of his domestic master-ship." Michelman, *supra* note 11, at 1535 n.175, but is far less explicit in describing the modern

More importantly, the informal popular role seems flawed from a republican perspective. If people contribute through expressions and exchanges they do not perceive as political, they may not have the experience of leaving a personal domain, marked by individualized assessments, for a sphere that is shaped by collective ends. Moreover, because these participants are not galvanized by the need for decision or action, they may not fully consider the perspectives of others. Also lacking in this scheme of casual, unofficial participation may be the experience of making collective decisions: "the possibility of an entire community consciously and jointly shaping . . . its way of life."²⁵ These defects may hinder the moral development of participants, a matter into which Michelman claims little insight.²⁶ But they may also impair the development of solidarity and political empathy,²⁷ qualities that are of value to any collectivity—particularly one that hopes to avoid exclusion and coercion of marginal groups.

A second set of problems with Michelman's vision concerns the political centrality that he grants the courts. The question is not whether the courts should be trusted with this authority—though cases such as *Patterson v. McLean Credit Union*²⁸ should lead us to question both the inclusionary commitment and "re-collective" potential of the judicial branch. The question is whether other participants merit the displacement they receive in Michelman's republican vision. Popular institutions are displaced because their political primacy results in an "authoritarianism" that is coercive and, more importantly, exclusive. This claim does not lack for support, as both the Georgia sodomy statute and the wretched history of segregation attest. Yet such exclusion, if inevitable, is not a consistent pattern. Non-judicial bodies were also responsible for the Civil War Amendments, and the pathbreaking legislation of the New Deal and Great Society. Although *Brown* is a crucial example of transformative, inclusive adjudication, one can still ask whether *Brown*—any more than the "switch in time [that saved nine]"²⁹—should be regarded as a single, monolithic paradigm for the making of law.

counterpart of this relation). Yet the abstract valuation and nurturance provided the citizen by this recollection of doctrine ultimately dwarf the public role for which they are intended to prepare her.

25. Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327, 344 (1981). Oddly enough, Michelman hails this as "the best contemporary statement of [participation] I know," Michelman, *supra* note 11, at 1503, but designs a jurigenic process in which it is not possible.

26. Michelman, *supra* note 11, at 1504. It is typical of Michelman's instrumental approach to republicanism that he eschews focus on those republican understandings that are good for the soul of the individual—and apparently those that are good for the cohesion of the community—to pursue those that "contemporary constitutional explanation and analysis cannot do without."

27. Sunstein makes this point eloquently in Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547 (1988).

28. 108 S. Ct. 1419 (1988) (proposing reconsideration of *Runyon v. McCrary*, 427 U.S. 160 (1976)).

29. Ackerman, *supra* note 17, at 1052. Ackerman argues that the "switch in time," historically thought to be motivated by Roosevelt's proposed packing of the court, was actually spurred by the

Greater gains might be achieved by a theory that posits variation in the patterns of lawmaking, or—to use Michelman's phrase—periodicity in the demands of citizenship.³⁰ Michelman considers this alternative in the form of Ackerman's publian theory, which he dismisses because of its tendency to foster "popular authoritarianism." While Michelman may be correct in saying that Ackerman erects no specific barriers against authoritarian exclusion, he errs in dismissing periodicity on such a slim critique. Periodic theories offer two insights that Michelman's more categorical role depiction does not provide. The first is the recognition that though a group or institution may pose a distinctive political danger, its motivation and conduct are likely to vary over time. Even the apathetic participants Ackerman describes as "perfect privatists"³¹ can sometimes be inspired to exert themselves in the political realm. The challenge is to use the group's energies when they can be properly focused, and limit the damage from its distinctive liabilities at other times.

The second insight is that in a system where governmental institutions are structured to produce differing perspectives, no single institution is likely to be able to identify all the changes that could enrich the collective life. The court perceived the need to include minorities who had remained for decades on the margins of political life. But Congress and the executive branch perceived the need for the economic transformation that produced the New Deal. A scheme that permits different institutional combinations in fundamental lawmaking may best be able to channel the creative and perceptive energies of all participants. Ackerman's notion of structural amendment reflects this insight. His point is not, as Michelman seems at times to suggest, that a single process of structural amendment embodied by the New Deal should replace the specifications of Article V. It is that there are many institutional combinations through which landmark legal change can be achieved, all of which are characterized by a period of self-conscious popular mobilization and choice.³² Michelman sacrifices this variety, as well as the moral and political benefits of the self-conscious mobilization, in order to avoid the dangers of exclusive authoritarianism. This seems a high price to pay. It may be necessary, if we credit Michelman's charge, to create a periodic theory that views popular coercion, rather than popular apathy, as the central political danger. But

Court's recognition that a process of structural amendment had taken place.

30. See Michelman, *supra* note 11, at 1519–24.

31. Ackerman, *supra* note 17, at 1033.

32. *Id.* at 1053–70. Ackerman describes the process of structural amendment not as a judicial ratification of a popular decision, but as a "highly charged dialogue among branches of government," *id.* at 1055, in which popular participants are first among equals—if indeed they enjoy any primacy at all. His point that the forms of structural amendments may differ can be drawn from his discussion of two such amendments: the New Deal's renunciation of *Lochner* and the formally dubious enactment of the Civil War Amendments. Michelman is, however, correct that one of Ackerman's purposes in the *Storrs Lectures* is to establish the legitimacy of activist judicial review, and he does so by reference to the judiciary's engagement with a mobilized citizenry.

we would do better alternately to tap and to control popular initiative, than to exile popular participants from the realm of self-conscious political action.

III. THE DANGLING CONVERSATION

If Michelman views republicanism as a means of saving constitutional theory, Sunstein's approach is less instrumental. He seeks to transform republicanism, long an object of historical interest, into a modern theory of practical promise. His main interest, in contrast to Michelman, is in the nature of popular participation. Sunstein rejects the meager role of interested dealmaking that popular politics has been assigned by liberal theory. He offers instead a model of public-spirited dialogue that is implemented by judicial and sometimes non-judicial means.

Yet if Sunstein is committed to republican participation, he is also haunted by a characteristically liberal dilemma. Although he wants to assert that legislative agreement can be achieved through dialogue, he is reluctant to constrain the plurality of participants by imposing substantive norms. His reluctance reflects a skepticism about objective "truth"³³ that has both liberal and critical versions.³⁴ But it arises mainly from a concern about the coercive potential of shared norms. Like Michelman, Sunstein is wary of "collectivist" forms of republicanism³⁵ and alert to the oppression that can be perpetrated by the state or mobilized groups of citizens.³⁶ Yet while Michelman insists on a substantive vision but implements it through the courts, Sunstein insists on popular primacy but equivocates on the use of substantive norms. This equivocation mars Sunstein's depiction of republican participation and restricts the range of his reforms. Because he cannot describe how dialogic exchange gives rise to legislative agreement, he is obliged to implement republican "deliberation" through proxies too broad to alter participatory behavior.

Sunstein's republicanism is defined by four norms: deliberation, equality of political actors, universality, and citizenship. Deliberation, the central value, means that "laws must be supported by argument and reasons."³⁷ Moreover, private interest does not supply a sufficient basis for argument: "Political actors must justify their choices by appealing to a

33. See Sunstein, *supra* note 27, at 1554-56.

34. See, e.g., J. MILL, ON LIBERTY 17-52 ("truth," if it exists, emerges through extended process of exchange and discussion; to assert it without such is not to find "truth" but assume infallibility) (liberal version); Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) [hereinafter *Justice Engendered*] (there is no objectively "true" view of world, but only differing perspectives that emerge from proponents' situations) (critical version).

35. See Sunstein, *supra* note 27, at 1539, 1566 (apparent sympathy with critics of Benjamin Rush).

36. See *id.* at 1569 (private organizations can also be source of oppression).

37. See *id.* at 1544.

broader public good."³⁸ Deliberation, however, is not embraced solely as an end. It is intended to produce decisions—decisions that are sometimes substantively preferable to those obtained in other ways. Sunstein expresses his faith in the connection between dialogue and legislative agreement with the concept of universalism: "the possibility of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue."³⁹

Whether and how differing perspectives can be mediated through dialogue is the most important question for Sunstein's theory. The answer is not clear. In some cases mediation can be achieved by means of broadly supported substantive principles that lead discussants to a common result. "The requirement of deliberation," Sunstein states, "embodies substantive limitations that in some settings lead to uniquely correct outcomes."⁴⁰ Two examples of such constraints are "freedom of speech" and "the prohibition of discrimination against blacks and women."⁴¹ At the other end of the spectrum lie cases in which mediation will be impossible: "[R]epublicans [do not] deny that differently situated individuals . . . will frequently be unable to resolve their disagreements through conversation. Sometimes compromises are necessary; sometimes there will be political losers . . ."⁴² But in the great run of cases, Sunstein suggests, mediation will be neither impossible nor unproblematic. In these cases, the outcome will be judged "substantively correct" by the criterion of "agreement among political equals."⁴³ The discussion will reflect "a commitment to political empathy, embodied in a requirement that political actors attempt to assume the position of those who disagree."⁴⁴

Even this empathic stance, however, is not wholly adequate as a description of mediation. It is not evident how one progresses from taking the viewpoint of another to agreeing on a particular resolution. Moreover, one of the most thoughtful proponents of the empathic deliberation has cast doubt on the capacity of such deliberation, in and of itself, to produce substantive choice.⁴⁵

Martha Minow embraces the empathic stance as a concomitant of her feminist critique of objectivity.⁴⁶ According to this critique, there is no

38. *Id.*; see also *id.* at 1551.

39. *Id.* at 1554.

40. *Id.* at 1550.

41. *Id.* These constraints might be understood to enjoy wide support on the ground that they are essential or prior to the dialogic process itself. However, given that they are stated at a remarkably high level of generality, I would suspect that the number of cases they are capable of resolving is extremely limited. As Sunstein certainly must realize, it is difficult to know what measures fall within these general terms, or whether they would still produce agreement when other similarly prevalent norms are offered in support of a competing point of view.

42. *Id.* at 1555.

43. *Id.* at 1554.

44. *Id.* at 1555.

45. See *Justice Engendered*, *supra* note 34, at 90-95.

46. Minow does not claim to have originated this critique. It has figured prominently in the work

such thing as an "objective" or "unsituated" perspective. One means of ameliorating the partiality of decisionmakers—in Minow's case, judges—is to require them to place themselves in the position of the disempowered. Yet this is only the first step of sound adjudication. The "deliberative" judge, who considers a variety of perspectives, is also obliged to mediate among them. Minow acknowledges this problem, and suggests that judges can avoid paralysis by making choices based on their "commitments."⁴⁷ But the distance between empathic deliberation and substantive affiliation that constitutes a "commitment" quickly becomes evident. Minow explicitly declines to specify the commitments to which judges should resort, or to derive a meta-commitment from the critique of objectivity itself, noting that such a choice would embody precisely the partiality she has decried.⁴⁸ As Minow's conundrum reveals, empathic deliberation may be in tension with the need to reach decisions, and may ultimately necessitate resolution by substantive principles.⁴⁹

It may be harsh to fault Sunstein for presenting an equivocal or unfinished portrait of republican deliberation. He takes American plurality as he finds it, and steadfastly resists the urge to claim more for republicanism than he is able to demonstrate or support. And a plausible, liberal fear of coercion prevents him from prescribing an increase in mediation by substantive norms. But the incomplete character of his account leaves a residue of doubt. While the self-understanding and the initial interaction of republican participants may be different, the lack of a shared normative framework may lead them to compromise, aggregate or otherwise resolve their differences in the ways that pluralists do. These doubts are further exacerbated by Sunstein's proposals for republican reform. These proposals, products of a laudable wish to commence practical change, reflect and highlight the ambiguities in Sunstein's vision.

Sunstein offers numerous suggestions, from judicial endorsement of campaign finance regulation to local autonomy; from reinterpretation of the canons of statutory construction to proportional legislative representa-

of Catharine MacKinnon, as well as of many radical feminists of color. See C. MACKINNON, *FEMINISM UNMODIFIED* (1987); G. ANZALDUA & C. MORAGA, *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* 34 (1981).

47. See *Justice Engendered*, *supra* note 34, at 91. Minow describes such commitments as "substantive" in nature, and notes "[w]e make commitments when we make decisions; we reconfirm or remake current understandings by reflecting so deeply and particularly about a new situation that we challenge presumptive solutions . . . [w]e . . . make decisions by immersing in particulars to renew commitments to a fair world."

48. See *id.* at 93. Minow states: "[R]ather than pretending to secure a permanent solution through a 'neutral' rule, I must acknowledge the tragedy of non-neutrality—and admit that our very commitment to tolerance yields intolerance toward some views."

49. See *id.* at 92–93. It appears that Minow sees a different culmination for empathic deliberation than does Sunstein when she notes, "[e]ven when we understand them, some voices will lose." *Id.* at 92. Sunstein views a decisional process that produces political losers as an occasional, if foreseeable, failure of deliberation. Minow, more realistically, views it as a natural, if regrettable, consequence of deliberation in a diverse community.

tion. Though their variety testifies to the many ways that republican theory can shape the political environment, they share several features that are troubling. First, they rely disproportionately on judicial enforcement.⁵⁰ Not only are Sunstein's judicial proposals among his most fully developed, but even some of his non-judicial suggestions are implemented by judicial means: local autonomy, for example, is protected in part by a narrow judicial approach to federal pre-emption. This might be criticized, first, as a circuitous approach to transforming popular participation. But there is a more critical problem. The proposed scrutiny occurs at a level of generality that is likely to obscure rather than clarify the features of legislative "deliberation." Courts may apply narrow construction to appropriations statutes, for example, on the ground that "deliberation is least likely in the appropriations process." Yet this approach is based on the broad conclusion that "the appropriations process is comparatively likely to be dominated by well-organized private groups . . . [and] lacks visibility."⁵¹ Not only is it unlikely that the cited features go to the essence of deliberation—there are few portions of the legislative processes that are highly visible or free from the influence of private groups—but this approach requires no scrutiny of the process that produced the legislation in question. Similarly, when judges foster local autonomy through a narrow approach to pre-emption, this solicitude does not seem to depend on the specific character of the local process. There are local legislative processes that are deliberative, and there are others that are intransigently pluralistic. It is important that judicial scrutiny distinguish between them: but to do so, a judge would need a more fully elaborated vision of the deliberative process. Perhaps because Sunstein is ambivalent about certain features of this process, he refrains from offering more specific proposals for review, as well as from designing institutions that would foster deliberation directly.⁵² Over the long run, however, reliance on such general or abstract judicial assessments would seem to dull rather than heighten our sense of the exchange to which participants should aspire.

50. I do not mean to suggest that Sunstein fails to offer non-judicial suggestions. In fact, he makes several, including proportional representation, local autonomy, and greater scope for private organizations. My point is simply that, given his goal of reforming popular political behavior, he expends a disproportionate amount of effort on the seemingly blunt tool of the judiciary; and that, aside from advocating proportional representation, he commits little attention to the question of popular institutional reform.

51. Sunstein, *supra* note 27, at 1582.

52. The one salient exception to this characterization is Sunstein's proposal for proportional legislative representation. However, embodying different viewpoints in distinct legislative delegations may be viewed as acknowledging the impossibility of meaningful deliberation, rather than facilitating it. Sunstein seems to acknowledge this point when he notes, "[i]n this respect, group representation would be a kind of second-best solution for the real-world failures of Madisonian deliberation." *Id.* at 1588. For a discussion of how greater deliberative interaction can be fostered by eschewing proportional representation in favor of other districting strategies, see Abrams, "Raising Politics Up": *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449 (1988).

IV. REVIVING REPUBLICANISM

It is ironic that the latest, legal contribution has shifted the focus of republican thought away from popular participants. In their distinctive ways, both Michelman and Sunstein redirect our attention to the activities of a narrower citizenry: members of the judiciary. For Michelman, this redirection is an end in itself: He transforms our understanding of "law," and vastly enhances the role of judges in making it, in order to protect American constitutionalism from the excesses of "popular authoritarianism." For Sunstein, recourse to the judiciary is largely instrumental. His "deliberative" politics is a prescription for participants in all phases of lawmaking. Yet Sunstein views the judiciary as a crucial instrument for shaping popular behavior. Focusing on the judiciary also permits Sunstein to proceed at a distance from thorny questions about deliberation and substantive norms. Each of these views has drawbacks as an attempt to redirect republican theory: The former reflects a retreat from the collective self-direction of mobilized citizens that has been the hallmark of republican thought;⁵³ the latter, a circuitous way of achieving it. Yet the concern about republicanism that underlies both—the coercive potential of citizens united by shared norms—is one that should not be ignored. The question is whether it is possible to re-animate the broadly participatory strain of republican thought without triggering the danger of popular coercion.⁵⁴

Not surprisingly, the foundations for such a conception can be drawn from Sunstein and Michelman themselves. Sunstein highlights the self-conscious participation of the people, and the use of deliberation in governmental institutions. His participants understand that they are not simply musing on politics, but are making choices that concern their common life. They know, moreover, that they must deliberate according to criteria more encompassing than their own interests. It may be difficult to define the term "public-regarding," particularly at the level of national politics. But the term nonetheless suggests that what is good for the group may be different from what is good for one member. And it conveys the value of recognizing and attending to different versions of this "good" when making group decisions.

Michelman supplies an element that Sunstein does not fully capture: the notion that a group's "good"—the principles that mediate collective

53. I concur in Herzog's critique that the historical emergence of a particular feature of republicanism ought not, in and of itself, validate it for political practice today. See Herzog, *Some Questions for Republicans*, 14 POL. THEORY 473, 475 (1986). However, taking the more Michelmanian view that republicanism demonstrates a certain thematic continuity despite its evolution over time, I would identify self-aware, popular self-direction according to norms more encompassing than the individual preferences of participants to be one of these continuing themes.

54. In this sense, my definition of the republican challenge is probably closer to Sunstein's than to Michelman's. Michelman seeks to eliminate the exclusivity or coercion that now occurs, or at least to eliminate judicial acquiescence in such patterns. Sunstein appears to be more concerned with the enhanced patterns of coercion that might be the outgrowth of a new focus on shared norms.

discussions—should be understood as a set of identifiable, yet evolving, substantive norms. Michelman's judges perceive that each community's history, culture, and politics create a fund of shared norms. They may be characterized in different ways, they may change or evolve over time, but they are sufficiently continuous and recognizable to guide crucial political choices. If this kind of the normative framework could be made accessible to popular participants as well, it would complete a blueprint for a popular republican theory.

A. *Nonjudicial Institutions*

If these features show us where republican theory should be going, we have next to ask how we can get there. This question requires us to reconsider the recent judicial focus. If our goal is to recast the role of popular participants in making decisions for a community, it seems odd to look for primary guidance from the courts.⁵⁵ Such courts handle startlingly few cases, and address most of these in a responsive posture. Save a few areas, where their most important role has been remedial or prohibitory, their influence on the behavior of most citizens is indirect and diffuse. If we want to encourage citizens to rethink their political behavior, we need approaches that are more likely to command their attention on a day-to-day basis.

Here, perhaps, we could take a leaf from the framers' book: the citizens' relationship to the polity is formed by popular political institutions. The self-interested pluralist norms of American citizens were shaped by the extended sphere, the intragovernmental system of checks and balances. It was only after this groundwork had been laid that the norms generated began to be enforced by the federal courts. If we want to foster republican norms, we should turn our attention to popular institutions. This goal might be addressed through reform of the federal legislative process, but such an approach holds obvious risks. First, federal institutions are uniquely distant from the lives of most participants. The average citizen would have little contact with the structures or practices that were intended to reform her political behavior. Moreover, federal institutions have been shaped to a considerable degree by pluralist values. Efforts to redesign existing institutions might be muted or distorted by the prevailing political ethos—a special hazard when republicanism is incompletely defined. It seems more useful to turn to new, distinctively republican institu-

55. These arguments apply, *a fortiori*, when this role is further restricted to the *federal* courts. This restriction is implicit in the schemes of both theorists. When Sunstein talks about the redirection of pre-emption doctrine, *see* Sunstein, *supra* note 27, at 1582, or the First Amendment view of federal campaign finance legislation, *see id.* at 1576–78, it seems likely that he refers to the federal courts. Because Michelman's argument is more abstract and less institutional, it is harder to tell; but judges not insulated by article III protections from political pressure would appear to lack the requisite distance from "popular authoritarianism" effectively to constrain it.

tions, in which citizens can experiment with a more self-conscious, collective form of political life.

Local political institutions, as theorists since Rousseau have argued, provide fertile ground for republican participation.⁵⁶ Even Sunstein endorses local autonomy, though he is cryptic about its specific advantages. Local institutions might contribute to the development of a self-conscious, normatively-based, deliberative popular politics in several ways. First, local politics and local political institutions are highly visible to most citizens and provide the easiest opportunities for direct political involvement. Their processes—and, at times, their products—can present citizens with a constant invitation to consider a new type of political life. Local institutions also tap the particularized norms that can become the basis for political action. Localities share histories and traditions that may be more vivid or tangible to their citizens than those of the state or nation; it may therefore be easier for citizens to grasp common norms at an applicable level of specificity. Because local citizens can see in comparatively concrete terms the ways in which their communities both change over time and retain a definable character, they may be better able to understand the kind of normative revision that occurs through decisionmaking.⁵⁷ Finally, focusing on local institutions reduces the possibility that shared norms will have a coercive impact on participants. This is true not only because the number and variety of local communities combats the impression that a given community's values comprise "objective truth." Local citizenship also provides unique opportunities for exit from a potentially coercive polity. Local politics control questions of citizenship and inclusion over only a limited domain. If a neighborhood or municipal body persists in acting on norms that a resident does not share, it is often possible to find a new neighborhood or relocate to a nearby town.⁵⁸ Such movement is not always an option, particularly for socio-economically disadvantaged citizens, but it is more feasible than in any larger political context.

It would, of course, be naive to suggest that simply propagating local

56. They also have enjoyed an enthusiastic contemporary revival, which continues to the present day. See, e.g., B. Barber, *supra* note 4; J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1980); H. ARENDT, *ON REVOLUTION* 234–59 (1965). I make no claim to originality in the re-discovery of local political institutions: on the contrary, I wish to close with an act of creative scavenging. My point here is to argue that these institutions respond not only to the goals identified by democratic theorists, but also to the distinctive concerns raised by legal republicans such as Michelman and Sunstein.

57. Whether the average participant can ultimately become comfortable with the process of "re-collection" over a broader geographical and cultural range (and therefore at a higher level of abstraction) is unclear, and is, moreover, a question as to which I am agnostic. However, it seems evident that if a participant does not experience this process first at the local level, where it is more accessible, she is unlikely to be able to engage in it at the national level.

58. Cf. Tiebout, *A Pure Theory of Local Expenditure*, 64 J. POL. ECON. 416 (1956). The Tiebout model of local expenditure is built on a similar assumption that citizens will move to the locality that offers the package of municipal services that best suits their needs. Its applicability to those less mobile by virtue of socioeconomic status or other disadvantages might, however, be called into question; hence the proviso in the text.

institutions would be sufficient to foster republican political activity. There is a great deal of local decisionmaking that conforms to the pluralist model. If we want to foster a self-conscious politics of collective substantive choice, we must consider the kinds of local institutions that will contribute to its development. Certain features of republican participation will have to be clarified before we can fully address the question of institutional design: What are the kinds of normative agreements that are likely to exist and to mediate republican dialogue at the local level? If such agreements are likely to extend mainly to goals, to what extent will this help mediate discussions concerning means? Yet, even if we begin with the fairly general features of republican participation highlighted above, it is possible to identify several institutional questions that will require further consideration. One set of questions concerns the appropriate size of the "local" polity. If accessibility and identifiability of common norms are crucial, for example, it may be useful to start at the sub-local or neighborhood level.⁵⁹ Another set of questions concerns the locus of political organization. Many models of local government are organized geographically, around the city or neighborhood council; but in some areas, it may better capture citizens' primary affiliations to organize local institutions around the workplace. Perhaps the most important set of questions concerns the decision procedures most likely to encourage the desired forms of political interaction. If the invocation of common substantive norms in many cases permits participants to reach agreement through deliberation, for example, it may be more appropriate to use consensus-based procedures than aggregative voting.

B. *Combatting the Threat of Exclusion*

If properly designed, local institutions may provide one means of encouraging new forms of popular participation. Yet they may not fully respond to the second challenge of contemporary republican theory: combatting the danger of coercive politics. The plurality of local communities and the possibility of exit diminish the both the likelihood and the impact of coercive politics. Moreover, the potential of local participants to engage in self-revising normative decisionmaking may encourage a more inclusive ethos, and reduce intolerance of those on the margins.⁶⁰ Yet localities have

59. Creating institutions at the neighborhood level may also have another advantage: Because many neighborhoods do not now have their own political institutions, reformers will not have to deal with an established pluralist ethos that has taken root in a set of existing institutions.

60. Some communities may embrace tolerance of diversity or non-conformity as a shared substantive norm. College towns, such as Ann Arbor, Michigan or Berkeley, California, have historically been distinguished by such norms. It may also be possible to describe the value of inclusive solicitude as a norm instrumental to the achievement of other substantive norms in the community, as Michelman does in describing the American polity. However, neither of these solutions will be appropriate for all localities at all times.

a disturbing history of intolerance toward non-conforming groups⁶¹ that even these reforms may not eradicate. It may be necessary to consider institutional strategies, not for preventing exclusionary urges, but for neutralizing their effects as they arise.

Two kinds of institutional approaches warrant further inquiry. The first is the exercise of concurrent powers. This approach would permit local bodies, operating according to the normative principles described above, to make decisions in conjunction with municipal or state bodies that have historically operated on a pluralist basis. This strategy has been employed in several municipal ordinances that have granted neighborhood groups power over development decisions.⁶² The rationale for concurrent powers is either that the pluralist body is less likely to be afflicted by exclusive tendencies, or that the tendencies of one group are unlikely to coincide with those of the other, thus reducing the chance that an exclusive urge will become law. The principle of concurrent decisionmaking may be implemented in a variety of ways, depending on the desired balance between republican decisionmaking and potentially exclusive outcomes. Authorizing legislation could require, for example, the approval of both bodies before proposals could be enacted, or that the two groups engage in (various types of) deliberation before reaching a collective conclusion. Concurrent approaches would offer the additional advantage of exposing participants who operate primarily within pluralist institutions to more republican forms of decisionmaking.

A second approach is a variant on the kind of periodic citizenship proposed by Bruce Ackerman. This strategy would require a separate institution, better equipped to propound the norms of inclusion, to check local excesses when and where they occur. Considerable theoretical authority exists for assigning this role to the courts.⁶³ The *Mount Laurel* case illustrates how judicial intervention might combat the exclusive tendencies of neighborhood decisionmaking.⁶⁴ However, this function might also be per-

61. This problem may, ironically, be due in part to the limited domain of local politics. The common norms and practices may seem so familiar—and alternatives so distant—as to make non-conformity more starkly unappealing.

62. Some of these ordinances have been enacted; others are still in the planning stages. Among them, they offer several different approaches to the concurrent exercise of power over development. The "Neighborhood Councils" Proposal, drafted by Boston's Coalition for Community Control of Development—for which I have served as a legal advisor—permits neighborhood councils and municipal agencies to share power over some aspects of development (e.g., both groups can classify planning overlay districts) and to exercise distinct but interrelated powers over others (e.g., neighborhood councils can grant zoning variances that relate to use, height, and density; the Zoning Board of Appeals can grant variances that relate to any other issue). Other ordinances, such as the "Early Warning" system in place in Minneapolis, provide for advisory powers to neighborhood groups. Proposals that grant neighborhood groups mere advisory powers may not be sufficient to foster republican participation.

63. See J. ELY, *supra* note 9. Justice Brennan has also suggested such a role for Congress acting under Section 5 of the Fourteenth Amendment. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966) (Brennan, J.).

64. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336

formed by state legislatures under conflict or pre-emption doctrines. This would not alter the primary political power of local republican bodies, but it would authorize another institution to displace or reverse the popular authority in those cases where the distinctive risks of its political involvement materialized.

Recovering the popular strain in republican theory may prove a challenging task for legal scholars. It requires that we depart from our habitual scrutiny of the judiciary, and confront the noisy intolerance of popular participants. Yet the task promises great rewards. Through this effort we may learn to view ourselves as institutional architects, as well as judicial advisors. And we may give republican meaning to the Madisonian insight that the best institutions stand ready to control the vices of their citizens, even as they attempt to foster their virtues.

A.2d 713 (striking down proposed zoning schemes that excluded low income families), *cert. denied*, 423 U.S. 808 (1975).